HACKS MALAYSIA SDN. BHD. v. WHITE HUDSON & CO. LTD.

[O.C.J. (Chang Min Tat J.) August 13, 1973]
[Penang — Civil Suit No. 55 of 1973]

Practice and Procedure — Application for further and better particulars — Whether justified — R.S.C. 1957, O. 19 rr. 5 & 6.

In this case the plaintiffs brought an action for breach of contract against the defendants. The defendants applied by summons in chambers for further and better particulars of the statement of claim.

Held: it did not appear that the particulars sought were of any material importance to the defendants in their defence and the application must therefore be dismissed.

Cases referred to:-

(1) *Phillips* v. *P.* 4 Q.B.D. 139.

(2) *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524.

CIVIL SUIT.

T. R. Hepworth for the applicants/defendants.

Datuk Eusoffe Abdoolcader and *S. Thillaimuthu* for the respondents/plaintiffs.

Chang Min Tat J.: This is an application by summons-in-chambers for further and better particulars of the statement of claim. A request for such particulars had previously been made by letter in compliance with Order 19 rule 7A of the Rules of the Supreme Court and refused. In the summons-in-chambers the particulars sought are stated to be as in this letter a copy of which was annexed to it.

It is contended at the hearing for the applicants that the particulars sought are necessary or desirable and that the application was justified by the particular circumstances of the case.

The respondents resist the application on two grounds. First, their counsel contends that the application made in the form of a summons-in-chambers and not by way of summons for directions is wrong in an action commenced by writ. Further, it is argued that the summons did not specify the particulars sought and also that apart from being defective, the affidavit in support of the application could not be used, without a special order of the judge under O.30 r.3. The respondents also contend that in the ordinary practice of the courts, the particulars sought should be refused.

In the view of the application I have now taken, I do not propose to deal with the matter of the form of the application or to consider whether such defects as there may be are or are not curable under O.70 r.1. With respect, I would leave it to another occasion to deal with the submission of Datuk Eusoffe Abdoolcader on this point. This is not to say that I disagree with it. In my view, adjudication of the application on the merits is always the more satisfactory course, especially where as here the respondents are eager for such a determination and therefore I do not propose to rule on it.

It is trite but perhaps necessary to remind ourselves that under our rules of pleadings, O.19 r.4 lays down that

"every pleading shall contain and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim... but not the evidence by which they are to be proved...."

O.19 r.5 provides for adherence to forms as much as possible and for costs against the party guilty of prolix pleadings, and O.19 r.6 for particulars "in all (other) cases in which particulars may be necessary." And as stated in the *Annual Practice* 1957 under "generally," at page 339, in every pleading a certain amount of detail is necessary to ensure clearness and to prevent "surprise" at the trial. Each party must state his case with precision, otherwise his opponent will not know for certain what is the real point in dispute and therefore will not be able to properly prepare his evidence for the trial. At page 340, this passage from the judgment of Cotton L.J. in *Phillipps* v. *P.*,[1] was cited:

"What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which put the defendants on their guard and tell them what they had to meet when the case comes on for trial."

The particular passage relied on by Mr. Hepworth for the applicants was this one from the judgment of Bowen L.J. in *Ratcliffe* v. *Evans*[2] at page 532

"In all actions accordingly on the case where the damage done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

What then are the facts of this case? Both parties are incorporated companies and juridicial identities. The plaintiffs' action is in relation to an agreement between the parties made on 20 July 1970 for the manufacture and sale of sweets under the trade name of "Hacks." Hacks is a registered trade mark of which the defendants are the proprietors. The agreement also refers to another trade name "Checks" but so far no sweets have been manufactured or put up for sale under this name. The defendants have the expertise for the manufacture of such sweets.

The statement of claim avers that by clauses 1, 7 and 9 of the agreement, the defendants gave licence to the plaintiffs to manufacture such sweets and sell the same for 5 years, and more. An extension of the period is provided for but under certain conditions which however are of no consequence for this decision.

By clause 12, the defendants agreed to do all things necessary to obtain the registration of the plaintiffs as the registered users of the said trade marks.

Clause 10 provided for the royalty to be paid by the plaintiffs to the defendants. It was fixed at 2% of the net income from the sales.

The defendants passed on the expertise for the manufacture and the plaintiffs set up a factory at Prai and commenced manufacture and sale. Royalties were alleged to be paid as under the agreement.

In September 1972, as a result of the takeover of the defendant company one McPhail became the chairman.

It was then averred that McPhail made certain demands, in particular to be made chairman of the plaintiff company. The demands were described as unlawful. It was also said that if the demand to be made chairman was not met, McPhail would terminate the agreement and withdraw the use of the said trade marks by the plaintiffs. The demand was not complied with and the defendants published in several newspapers notice of such termination and threat, at large, of prosecution for unwarranted user.

It was alleged that such termination was a breach of the agreement and malicious and had occasioned damage.

General damages were prayed for. Special damages were specified as $3,500 for counsel's and solicitor's fees and $3,876.00 for costs of publication of counter notices in the newspapers.

It was admitted that the defendants had now by letter and open publication withdrawn their notice of termination but the plaintiffs claimed that the defendants had not done anything to procure their registration as registered users.

The prayers asked for are: —

(a) specific performance of the agreement
(b) alternatively damages
(c) specific performance of clause 12
(d) injunction
(e) damages
(f) further or other relief, and
(g) costs.

It will therefore be seen that the cause of action is breach of contract.

The first particular asked for is the status of P. L. Aspinall, who was mentioned in paragraph 3 of the statement of claim as holding 5% in the plaintiff company and the managing director thereof.

With respect, the view I have taken is that having regard to the cause of action and the fact that the action is between two legal persons, the date and manner of the appointment of P. L. Aspinall is not a matter that is strictly relevant to the issues raised on the statement of claim.

There is even less justification for the demand for details pertaining to the sweets and confectionery manufactured by the defendants. The demand was not pressed and nothing more needs be said.

With respect, I hold the same view as regards the demand for the details of the sweets and confectionery manufactured by the plaintiffs under the agreement from March 1970. This demand was perhaps allied to the other one regarding the royalties paid.

It does not appear that the particulars sought are of any material importance to the defendants in their defence to the action in this case, which, let us remind ourselves, is for damages for an alleged unlawful termination of a contract. The duty and obligation to defend does not involve allegation of manufacture of articles other than those provided for in the agreement or of short payment of royalties since there is before me no action for such claims.

As for the demands made by McPhail on the plaintiffs, the view I have taken is that the one demand that was of any consequence was the demand to be made chairman. This is of sufficient particularity. I am also of the opinion that the manner in which this threat was made is not material, in the light of the averment, which the defendants cannot deny, that it was in fact carried out, though subsequently retracted.

The defendants also require to know the full details of the enquiries addressed to the plaintiffs consequent on the termination and the steps taken by the plaintiffs to explain the plaintiffs' position to such enquiries. These details go to general damages and it is settled law that general damages are not particularised. The details may profitably be the subject matter for discussion between the parties for an agreed statement of facts at a subsequent stage but for the moment I do not, with respect, see how they are necessary or can take the defendants by surprise.

The specific damages are, in my view, of sufficient particularity as not to justify granting the request. The defendants could always ask for inspection of all receipts and bills, if they cannot wait for the time when these receipts and bills will have to be shown to them to prepare the documents for the trial.

On as thorough an examination of the request made as I am capable of giving to it, it does not appear to me that the particulars sought are necessary to prevent the defendants from being taken by surprise.

It is also said that the particulars are desirable in the circumstances of the whole case. Reading the affidavits filed hitherto, as I am entitled to do, I rather gather that these circumstances concerned the position of P. L. Aspinall. It is the view of the defendants that P. L. Aspinall had no right to remain as chairman of the plaintiff company and that neither he nor the plaintiffs were entitled to exclude McPhail from the chair. The defendants will perhaps excuse me if I make bold to say that, at least in my view, they seem to regard their view as something firmly established and beyond contention or argument, but whatever may be the correct position in fact and in law, their request is insisting upon more than what they are entitled to, according to the rules of pleading. The character of the act which produces the damage is their termination of the contract and the circumstances under which the termination was done (and I would add, their reasons for so doing) are matters within their knowledge.

The application is dismissed.

Application dismissed.

Solicitors: *Allen & Gledhill; S. Thillaimuthu.*